

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1446

To be argued by
RHEA KEMBLE NEUGARTEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1446

UNITED STATES OF AMERICA,

—v.—

GILBERT ANDREW FRIEDMAN,

Defendant-Appellant.

B
P/S
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

RHEA KEMBLE NEUGARTEN,
HARRY C. BATCHELDER, JR.,
ROBERT J. JOSSEN,
*Assistant United States Attorneys
Of Counsel.*

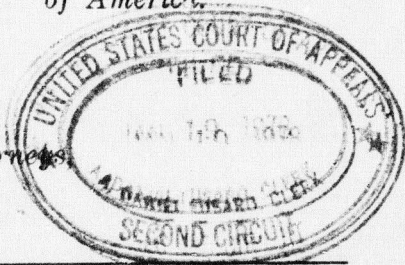


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
A. Summary of the Facts Underlying the In- dictment	3
B. The Guilty Pleas and Friedman's Sentenc- ing	4
C. Post-Sentence Petitions	8
D. The Rule 32(d) Motion	9
E. The District Court's Opinion	11
ARGUMENT:	
POINT I—The District Court Properly Rejected Friedman's Belated Claims Under Fed. R. Crim. P. 11	12
A. Friedman Was Adequately Advised Of The Nature Of The Charge	13
B. The Remaining Claimed Violations of Rule 11 Did Not Prejudice Friedman And Do Not Entitle Him To Relief	18
POINT II—Friedman Was Not Denied Effective As- sistance Of Counsel By The Representation Of His First Attorney	26
POINT III—Neither Resentencing Nor An Eviden- tiary Hearing Was Required On Friedman's Col- lateral Attack	31
CONCLUSION	35

APPENDIX TO THE GOVERNMENT'S BRIEF:

Statement of Defendant before Arraignment
made to Assistant United States Attorney ... 1a

TABLE OF CASES

<i>Aviles v. United States</i> , 405 F. Supp. 1374 (S.D.N.Y. 1975), <i>aff'd without opinion</i> , 538 F.2d 307 (2d Cir. 1976)	20, 25
<i>Bell v. United States</i> , 521 F.2d 713 (4th Cir.), <i>cert. denied</i> , 424 U.S. 918, 96 S. Ct. 1121, 47 L. Ed. 2d 324 (1975)	25
<i>Blackledge v. Allison</i> , — U.S. —, 97 S. Ct. 1621, 51 L. Ed. 2d 136 (1977)	20
<i>Del Vecchio v. United States</i> , 556 F.2d 106 (2d Cir. 1977)	12, 19, 20, 21, 22, 25
<i>Dorszynski v. United States</i> , 418 U.S. 424, 97 S. Ct. 3042, 41 L. Ed. 2985 (1974)	34
<i>Ferguson v. United States</i> , 513 F.2d 1011 (2d Cir. 1975)	24
<i>Irizarry v. United States</i> , 508 F.2d 960 (2d Cir. 1975)	13, 15, 16
<i>Kelleher v. Henderson</i> , 531 F.2d 78 (2d Cir. 1976)	20
<i>LiPuma v. Commissioner</i> , 560 F.2d 84 (2d Cir. 1977)	27, 28, 29
<i>Rickenbacker v. Warden</i> , 550 F.2d 62 (2d Cir. 1976)	28
<i>Seiller v. United States</i> , 544 F.2d 554 (2d Cir. 1975)	13, 16, 17, 30
<i>Townsend v. Burke</i> , 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948)	32
<i>United States v. Alfano</i> , 555 F.2d 1128 (2d Cir. 1977)	30

	PAGE
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir.), cert. denied, — U.S. —, 97 S. Ct. 2686 (June 6, 1977)	18
<i>United States v. Bubar</i> , Dkt. No. 76-1140, slip. op. 4519 (2d Cir., June 30, 1977)	26, 27, 28
<i>United States v. Culp</i> , 472 F.2d 459 (8th Cir.), cert. denied, 411 U.S. 970 (1973)	10
<i>United States v. Daniels</i> , 558 F.2d 122 (2d Cir. 1977)	30
<i>United States v. Faruolo</i> , 506 F.2d 490 (2d Cir. 1974)	10, 30
<i>United States v. Garguilo</i> , 554 F.2d 59 (2d Cir. 1977)	18
<i>United States v. Harris</i> , 558 F.2d 366 (8th Cir. 1977)	30
<i>United States v. Journet</i> , 544 F.2d 633 (2d Cir. 1976)	11, 19, 25
<i>United States v. Malcolm</i> , 432 F.2d 809 (2d Cir. 1970)	33
<i>United States v. Martinez-Carcano</i> , 557 F.2d 966 (2d Cir. 1977)	18
<i>United States v. Michaelson</i> , 552 F.2d 472 (2d Cir. 1977)	19, 21
<i>United States v. Michel</i> , 507 F.2d 461 (2d Cir. 1974)	24
<i>United States v. Miley</i> , 513 F.2d 1191 (2d Cir.), cert. denied sub nom. <i>Vavarigos v. United States</i> , 423 U.S. 842 (1975)	10
<i>United States v. Needles</i> , 472 F.2d 652 (2d Cir. 1973)	32, 33, 34
<i>United States v. Richardson</i> , 483 F.2d 516 (8th Cir. 1973)	24
<i>United States v. Riniolo</i> , 554 F.2d 550 (2d Cir. 1977)	34

	PAGE
<i>United States v. Robin</i> , 545 F.2d 775 (2d Cir. 1976)	33
<i>United States v. Rodriguez</i> , 556 F.2d 638 (2d Cir. 1977)	29
<i>United States v. Rosner</i> , 485 F.2d 1213 (2d Cir. 1973), <i>cert. denied</i> , 417 U.S. 950 (1974)	32, 33
<i>United States v. Saft</i> , 558 F.2d 1073 (2d Cir. 1977)	11, 16, 17, 21,
<i>United States v. Seijo</i> , 537 F.2d 694 (2d Cir. 1976)	34
<i>United States v. Taylor</i> , 562 F.2d 1345 (2d Cir.), <i>cert. denied</i> , — U.S. — (1977)	28
<i>United States v. Wight</i> , 176 F.2d 376 (2d Cir. 1949), <i>cert. denied</i> , 338 U.S. 950 (1950)	28
 <i>Statutes:</i>	
18 U.S.C. § 3651	2
21 U.S.C. § 812	2
21 U.S.C. § 841	2, 19
21 U.S.C. § 846	1
28 U.S.C. § 2255	1, 11
 <i>Other Authorities:</i>	
Federal Rules of Criminal Procedure, Rule 11 ..	12, 13, 19, 20, 21, 23, 25
Federal Rules of Criminal Procedure, Rule 32(d)	1, 3, 8, 9, 13, 15, 18, 29, 31
Federal Rules of Criminal Procedure, Rule 35 ..	2, 8, 9, 23, 27, 31, 35

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Docket No. 77-1446

UNITED STATES OF AMERICA,

Appellee,

—v.—

GILBERT ANDREW FRIEDMAN,

Defendant-Appellant.

**BRIEF AND APPENDIX FOR
THE UNITED STATES OF AMERICA**

Preliminary Statement

Gilbert Andrew Friedman appeals from an order entered on May 19, 1977, in the United States District Court for the Southern District of New York, by the Honorable Kevin T. Duffy, United States District Judge, denying his post-conviction motion, pursuant to Fed. R. Crim. P. 32(d), to set aside the judgment of conviction, and, in the alternative, for collateral relief pursuant to Title 28, United States Code, Section 2255.

Indictment 76 Cr. 441, filed April 29, 1976, charged Gilbert Andrew Friedman, a/k/a "Chris," and Alan Lester Gassberg, a/k/a "Alan Carson," in Count One with conspiracy to distribute Schedule III narcotic drug controlled substances, in violation of Title 21, United States Code, Section 846, and in Counts Two, Three, Four and Five with actual distributions in December, 1975 of large quantities of barbituric acid, in violation of Title

21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).*

On July 27, 1976 Gassberg and Friedman withdrew their pleas of not guilty previously entered, and before Judge Duffy each entered a plea of guilty to Count One, the conspiracy count of the indictment.

On September 19, 1976 Judge Duffy sentenced Friedman to a term of imprisonment of three years, with a special parole of three years to follow.**

On October 26, 1976 Friedman, with the assistance of new counsel who had been substituted after his sentencing, moved pursuant to 18 U.S.C. § 3651 and Fed. R. Cr. P. 35 for a suspension of, or reduction in, his sentence and for an order delaying surrender until the motion was decided. On October 29, 1976 Judge Duffy denied both motions by endorsement order.

By letters dated November 22 and 24, and December 7, 1976, Friedman made further Rule 35 motions. Judge Duffy denied the motions by endorsement-orders on December 3, 6 and 16, 1976. Although Friedman's counsel filed notices of appeal from the orders entered on December 3, 6 and 16, 1976, an appeal never was perfected.***

* Friedman alone was charged in Count Five, and Gassberg alone in Count Four. Each of those counts was incorrectly charged as both a distribution and a possession with intent to distribute. Based on the facts alleged, they should have been charged solely as possessions with intent to distribute.

** On October 15, 1976 Judge Duffy suspended the imposition of sentence on Gassberg and placed him on probation for four years, with a special condition that he remain free of drug use.

*** On February 4, 1977, Friedman filed a stipulation in this Court substituting a third counsel for his previous (second) counsel, and simultaneously moved for an extension of time to perfect his appeal. Although his motion was granted, Friedman's appeal from the orders denying a reduction in sentence never was perfected.

On March 9, 1977, Friedman moved in the District Court to vacate his sentence and, for the first time, pursuant to Rule 32(d) to withdraw his guilty plea, or in the alternative for a writ of *coram nobis*. On April 19, 1977, Judge Duffy heard argument on these motions, and by an opinion and order filed May 19, 1977, denied the motions. It is from this order that Friedman has taken the present appeal.

Statement of Facts

A. Summary of the Facts Underlying the Indictment

The Government's proof at a trial would have established that Gilbert Friedman and Alan Gassberg were members in a conspiracy to possess and distribute commercially prepared pills which contained barbituric acid, a Schedule III controlled substance. Friedman was the admitted source of supply of a large quantity of pills which Gassberg, in turn, attempted to sell illegally.

In the course of this conspiracy on December 15, 1975, Gassberg—after meeting with Friedman—negotiated for the sale of at least 500 pills containing barbituric acid with persons who, unbeknownst to defendants, were agents of the Drug Enforcement Administration. About 10 days earlier Gassberg had sold approximately 1050 pills containing barbituric acid, in the form of seconal, nembutal and valium, to the agents. Again, on that day, Friedman had met with Gassberg to supply the pills.

After Gassberg's December 15th negotiations and pursuant to a consent search, approximately 17,000 pills, many of which contained Schedule III controlled substances, were found in Friedman's apartment. After

arrest, Friedman admitted that he was Gassberg's source of supply.*

B. The Guilty Pleas and Friedman's Sentencing

On July 27, 1976, Gassberg and Friedman, *seriatim*, entered pleas of guilty to Count One of the indictment. Gassberg's plea—the entirety of which Friedman heard (P.T. at 3, A-64)—was taken first. Moments later Friedman offered to change his plea to the conspiracy count, and also pleaded guilty to Count One. (P.T. at 2, A-63). Friedman was represented by Allan Passin, Esq., privately retained counsel, who had represented him at all stages of the proceedings, including Friedman's original appearance on the magistrate's complaint at the time of his arrest in December 1975. (A-7). Indeed, Passin apparently had been Friedman's counsel for years, representing him in connection with business transactions as well. (A-166).

Notwithstanding his representation by counsel, from the start of the guilty plea proceeding Friedman himself

* The factual statement set forth above is taken from the pre-sentence report, and Friedman's initial post-sentencing affidavit quoted in full in the appendix. (A-76 et. seq.). As used in this brief references to "A-...." are to pages in the appellant's appendix; references to "Br." are to pages of Friedman's Brief on Appeal; references to "P.T." are to pages of the transcript of Friedman's plea of guilty; references to "S.T." are to pages of the transcript of the sentencing of Friedman; references to "G.T." are to pages of the transcript of the guilty plea of Friedman's co-defendant Gassberg; references to "Batchelder Aff." are to the affidavit of Assistant United States Attorney Harry C. Batchelder, Jr., filed in opposition to Friedman's motion; and references to "Passin Aff." are to the affidavit of Allan Passin, who was Friedman's trial counsel, attached to the Batchelder affidavit. A copy of the pre-sentence report "PSR" was filed on a sealed basis in the District Court. It had earlier been available to the Government, as well as to Friedman and his lawyers, and at least Friedman's first and second attorneys actually reviewed it.

responded directly to the District Court's questions.* First, Friedman and his counsel both explicitly stated that there was no need for the court to read the indictment to him, and it was noted that his attorney had explained the indictment to Friedman. (P.T. 2, A-63). As Judge Duffy later summarized the proceedings in his decision denying Friedman's present motion, the following then took place:

"Friedman was informed that he had a right to a public trial before a judge or judge and jury; that at such a trial he had the right to confront witnesses and cross-examine them; that he would be presumed innocent until proven guilty; and that he would be entitled to call his own witnesses and, if necessary, the Court would issue orders to have such witnesses produced. At four separate junctures, Friedman expressly acknowledged that he understood these rights.

[Judge Duffy] then asked 'the defendant if he understood that the indictment charged him with [conspiracy with his codefendant and possibly with others to distribute or possess with intent to distribute] valium and amphetamines. Friedman expressed his awareness of the charge by stating that as far as he knew only valium was involved in the conspiracy. When asked whether he did in fact possess the valium, he answered in the affirmative.

Friedman further indicated that no threats or promises had been made to induce him to plead guilty and that no one made any predictions as to the sentence that might be imposed. He indicated that he was not under the present influence

* Friedman was a well-educated and knowledgeable defendant, having completed several college courses, (PSR at 6), and enjoyed extensive business experiences, both as an accounting executive and as an entrepreneur engaged in the operation of two Medicaid facilities. (PSR at 8-9; A-71-2; S.T. 4-5).

of any narcotic drug or alcohol and that he was not then under the present care of a psychiatrist or physician." A-149-50.

Friedman already had heard Judge Duffy explain to co-defendant Gassberg that "[b]asically, the first count of the indictment charges you and others with conspiring to possess and distribute a Schedule 3 narcotic drug controlled substance and certain overt acts are thereafter alleged, the overt acts touching on Schedule 3 narcotic drugs of Valium, barbiturates." (G.T. at 3-4). Friedman also had heard the District Court advise Gassberg that he could receive "special parole" as well as a jail term and fine, information later confirmed to Friedman directly when the trial judge told him that he could receive two years special parole, as well as a jail term and fine. Finally, Friedman heard the Court ask Gassberg if he understood the charges against him and the "kind of penalties" "that could be imposed". *Ibid.*

At the time he accepted defendant's plea, Judge Duffy did not specifically advise Friedman that he had the right not to be compelled to incriminate himself. This advice of right, however, earlier had been given to Friedman at his arraignment before the Magistrate (A-7) and by an Assistant United States Attorney during a pre-arraignment interview when Friedman again was accompanied by his attorney, Mr. Passin. (GA 1a)*

* At no time in the District Court on the present motion did Friedman complain that he was not advised of his rights, or that he was not told that, if necessary, a lawyer would be appointed to represent him. Accordingly, these contentions were not addressed previously by the Government. In view of the fact that these points are raised—although the Government contends improperly—on appeal, the form reflecting Assistant United States Attorney Batchelder's interview with Friedman is included in the Government's Appendix herein. By including this material in response to Friedman's new contentions on appeal, the Government in no way waives its objection to Friedman's prior inclusion—*sua sponte*—of a new affidavit by him in the appellate materials.

Indeed, Passin, who was retained counsel, remained with Friedman at all stages, through the sentencing. Moreover, while at all times Friedman obviously had his own privately retained attorney, he was advised both by the Assistant United States Attorney (GA 1a) and Magistrate Hartenstine (A-7) of his right to have appointed counsel if he was financially needy, and Magistrate Hartenstine's advice specifically included the statement that Friedman had a "right to counsel at all stages of proceedings". (A-7). Given that Friedman obviously had a retained lawyer present—and that Friedman had seen that co-defendant Gassberg had had counsel from the Federal Defender's Unit of the Legal Aid Society throughout, Judge Duffy at the plea allocution did not remind him of the right, if necessary, to appointed counsel*.

Approximately two months after entering his guilty plea, Friedman was sentenced on September 17, 1976 to three years in prison, followed by three years special parole. (A-73; A-16-17).

Before sentencing Friedman's lawyer was asked—in Friedman's presence—if he had reviewed the pre-sentence report. (S.T. 2, A-69). Passin replied affirmatively, and

* Friedman in fact not only *had* retained counsel, but was able shortly after his sentencing to retain new counsel, David L. Fox, Esq. (A-19), when Passin refused to represent Friedman any further because of an alleged inability to pay. At that stage Friedman in no way suggested that Passin had not assisted him fully up to that point or that he, Friedman, would be unable to pay Mr. Fox. Indeed, when Friedman later discharged Mr. Fox, and retained William L. Finger, Esq., there was no suggestion that Friedman was unable to pay either Mr. Fox or Mr. Finger. Finally, when Stephen David Fink, Friedman's present counsel and Mr. Finger's previous associate, was substituted for Mr. Finger, it was revealed that the cost of this appeal would be \$3,500. Again, there was no suggestion that Friedman could not meet this fee.

then commented on certain aspects of that report, reflecting not only that he had read it—but that he must have discussed it with Friedman, who had to have been the source of certain information which Passin mentioned.

Friedman addressed the Court personally and emphasized that in his view he was a hard worker, with a history of employment, without any criminal record (A-71-72), and that this was a “one-shot” situation. (A-72).

C. Post-Sentence Petitions

Approximately one week after his sentence—less than ten days after the judgment was entered—Friedman retained a new attorney, David L. Fox, to bring a Rule 35 motion and to move for an adjournment of Friedman's surrender. This postponement was granted. (A-23). In the meantime, neither Friedman's former nor new counsel filed a notice of appeal from the judgment of conviction, or a Rule 32(d) motion. In fact, Friedman's affidavit in support of the adjournment did not reflect any dissatisfaction with the guilty plea or proceedings, but only with the resulting sentence.

Thereafter, Friedman continued to seek a reduction in the sentence. He filed the Rule 35 motion, dated October 26, 1976. In connection with this motion Friedman contended, among other things, that before sentencing he had not been advised that the informant's statement that Friedman had been selling 10,000 to 20,000 barbiturates weekly was in the pre-sentence report. Friedman's contention was refuted by the probation officer who averred that during the pre-sentence investigation he confronted Friedman with the informant's allegation, and that Friedman denied it. (Batchelder Aff. ¶ 7, A-13). Friedman's motion papers again advised Judge Duffy of his claim that this was a one-shot criminal affair and that he never had met Gassberg until three weeks before the first sale.

(A-77). Finally Friedman's motion made reference to certain alleged favorable or mitigating factors. Judge Duffy considered the affidavit and exhibits and denied the motion (A-99). Friedman then went to jail on November 19, 1976.

Thereafter Friedman submitted various letters to Judge Duffy complaining of conditions in prison and asking that his sentence be reduced. Each such petition was denied and notices of appeal were filed as to each order denying relief. None of the petitions complained of the guilty plea, asked to withdraw it, or in any way suggested that it was entered as a result of confusion or lack of information. Only the sentence was the target of complaint. Friedman's appeal from these denials never was perfected.

D. The Rule 32(d) Motion

Friedman eventually discharged his second counsel, Mr. Fox, and retained Mr. Finger to pursue further remedies. Finger filed a new Rule 35 motion, coupled with—for the first time—a belated motion, pursuant to Fed. R. Crim. P. 32(d), to set aside the guilty plea. (A-30, 31-36). In these papers Friedman, for the first time, charged that he "did not have a knowledge of the nature of the [plea] proceedings or an understanding of the consequences of the plea . . ." (A-32). Friedman contended that he was not properly advised of the meaning of a conspiracy, that the mentioned two-year special parole term was a *minimum*,* or what was meant by the term special parole. He made no complaint about not having been advised of his rights to remain silent at trial, or to have counsel appointed if financially necessary.

* Friedman also contended incorrectly that the minimum was in fact three years special parole. To the contrary, for Schedule III drugs, as involved herein, the minimum special parole is two years.

Friedman also alleged ineffective assistance of counsel because no direct appeal was taken from the judgment of conviction, no motions had been made in the District Court and possible defenses were not explored. Despite having had not one, but two, lawyers in the interim, Friedman did not suggest that his earlier consent to search his apartment was not given voluntarily—a claim now raised on appeal for the first time*—nor did he submit any affidavit detailing the nature of his pretrial preparation with Mr. Passin. Friedman also again contended that the pre-sentence report had been inaccurate.

In response to this motion, the Government submitted an affirmation by Mr. Passin in which he categorically declared that:

“[t]here is no question of the fact, in my mind, that Gilbert Friedman knowingly and willingly offered a plea of guilty after consultation with me, as his attorney and friend. He completely

* The Government's proof demonstrates that Friedman consented to the search of his apartment which resulted in the seizure of pills. At no time prior to this appeal did any of Friedman's three lawyers or Friedman himself argue that the consent was not voluntary. However, in the Appendix on this appeal, Friedman, for the first time, has included an affidavit in which he suggests that his consent was coerced. (A-167). This affidavit was not filed with any court or served on the United States Attorney's Office until filing and service of the Appendix. Accordingly it clearly is not a proper part of the record on this appeal. Moreover, even in this thirteenth hour affidavit, Friedman does not deny that he invited the agents to his apartment. Rather, all that he contends is that he did so on the basis of the agents' alleged representations that they would get a search warrant otherwise, and that the search would be thorough. These remarks, of course, would not necessarily have invalidated the consent. See, *United States v. Faruolo*, 506 F.2d 490, 493-95 (2d Cir. 1974). See also, *United States v. Miley*, 513 F.2d 1191, 1204-05 (2d Cir.), *cert. denied sub nom. Vavarigos v. United States* 423 U.S. 842 (1975); *United States v. Culp*, 472 F.2d 459, 461 (8th Cir.), *cert. denied*, 411 U.S. 970 (1973).

understood the nature of the proceedings and understood the consequence of his plea. . . ."

Passin also noted that after he inspected the entire government file he discussed its contents with Friedman before the guilty plea was entered. (A-34).

Friedman submitted no reply papers or affidavit contradicting Mr. Passin.

E. The District Court's Opinion

Following oral argument Judge Duffy denied Friedman's motion on May 19, 1977 in a sixteen page opinion and order. (A-148-163). Judge Duffy held that on the basis of the plea inquiry and Friedman's background, Friedman "was informed of and understood the criminal object of the conspiracy and that the participation of more than one person was required." Judge Duffy found that based on attorney Passin's advice and Friedman's own sophistication, Friedman knew the "full meaning" of the reference to "two years special parole," and that in any case, the failure to have mentioned that the two years was a minimum was harmless, inasmuch as the sum of the sentence actually imposed was less than the maximum sentence mentioned to Friedman. (A-155-56).*

The District Court also held that Friedman was "most adequately represented by his chosen counsel" (A-159) and that the pre-sentence report stated the *defendant's* ver-

* Judge Duffy also held (A-155-57) that *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976) should not be applied retroactively. On appeal, the government contends only that in collateral attack via petitions under 28 U.S.C. 2255 or similar devices, it should not be so applied, while as to direct appeals, under the law of the Circuit, Journet's standards govern all pleas taken after December 1, 1975. *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977).

sion, as well as the Government's version, of the facts of the crime. (A. 160). Finally, the court observed:

"since trial counsel was given an adequate opportunity to examine the entire pre-sentence report, including the probation department's recommendation, to state his objections thereto, and to provide the defendant's version of the facts, nothing further was required of this Court." (A-162).

ARGUMENT

POINT I

The District Court Properly Rejected Friedman's Belated Claims Under Fed. R. Crim. P. 11

On this appeal from the denial of the collateral attack upon his July, 1976 guilty plea, Friedman asserts that the District Court violated the technical requirements of Fed. R. Crim. P. 11(c) in four respects and therefore should have vacated the conviction which followed defendant's plea. Two of defendant's Rule 11 claims never were made in the District Court even on Friedman's untimely motion pursuant to Fed. R. Crim. P. 32(d), and should be rejected on this basis alone. See *infra* at 18-22. Moreover, the two claims which Friedman did advance belatedly in the District Court were considered at length by Judge Duffy and rejected by the trial court as unfounded on the totality of the record of the guilty plea proceedings before him. Finally, in the unwarranted attempt to void his conviction with technical claims that never were advanced in a timely manner through the adequate representation of two separate retained attorneys, Friedman ignores the effect of this Court's decision in *Del Vecchio v. United States*, 556 F.2d 106 (2d Cir. 1977). Under *Del Vecchio*, the scope of review on collateral attack of claimed violations of Rule 11 is considerably narrower than on direct

appeal from a conviction. Thus, as we will now demonstrate, even if Friedman's claims all are considered on the merits and amounted to technical violations of Rule 11, Judge Duffy's denial of defendant's motion still must be found to have been correct and proper.

A. Friedman Was Adequately Advised Of The Nature Of The Charge.

Friedman's principal contention—one of the two raised by him in the District Court on his Rule 32(d) motion—is that he was not adequately advised of the nature of the narcotics charge to which he pleaded guilty. (Br. at 8-15). Although Friedman never has contended that he actually did not understand the nature of the conspiracy charge, relying upon *Irizarry v. United States*, 508 F.2d 960 (2d Cir. 1975) and *Seiller v. United States*, 544 F.2d 554 (2d Cir. 1975) (in which the guilty plea was upheld in relevant part), he argues that the allocution was so deficient as to this requirement of Rule 11 as to mandate the vacating of his plea. On the record here, as Judge Duffy found, this claim does not withstand sound analysis.

In his guilty plea, Friedman himself, as well as his counsel, expressly declined the court's invitation to have the relevant count in the indictment read to him. Upon waiving this reading, Friedman's counsel stated that the charge in the indictment "had been explained" to defendant, a fact later amplified and confirmed in counsel's affidavit submitted in opposition to the present motion. After then explaining the nature of the allocution proceedings, Judge Duffy explained that the indictment "charges you with conspiring with your co-defendant and possibly with others to possess with intent to distribute, and/or to distribute" certain narcotic drugs. The district judge then specifically asked if Friedman understood the charges. In response, Friedman acknowledged

that valium was a part of the conspiracy, but not amphetamines.*

While this allocution was relatively brief, it was more than sufficient to establish defendant's understanding of the charges against him. Thus, by its inquiry the trial

* In relevant part, the following had transpired at Friedman's allocution:

"THE COURT: Do you wish the first count of the indictment read you?

THE DEFENDANT: No, your Honor.

MR. PASSIN: Your Honor, we waive the reading. It has been explained to him.

THE COURT: How do you plead, guilty or not guilty?

A. Guilty, your Honor.

Q. You heard me just tell your co-defendant that I could not accept the plea unless I was convinced that it was voluntary, that you understood your rights, and that you understood the consequences of your plea and, in fact, you were guilty. You heard me explain to him that he would have been entitled to a public trial by a judge, a judge and a jury if he persisted in a not guilty plea.

Do you understand that?

A. Yes, sir.

* * * * *

Q. The first count of this indictment basically charges you with conspiring with your co-defendant and possibly with others to possess with intent to distribute, and/or to distribute, certain schedule 3 narcotic drugs basically valium and amphetamines.

Do you understand that, sir?

A. Excuse me, your Honor?

MR. PASSIN: Your Honor, my client explains to me there were no amphetamines at all.

THE COURT: As far as he was concerned, but as part of the conspiracy.

Q. Do you agree it was part of the conspiracy?

A. There was no amphetamines, your Honor, not to my knowledge.

Q. But did you know about the valium?

A. Yes, sir.

MR. PASSIN: Yes."

(P.T. 2-4, A-63-65). (Emphasis added)

court was assured that Friedman, a relatively well-educated and knowledgeable person, had had the charges explained to him by his attorney and did not need a further reading of the indictment, understood that the charges related to joint activity in drugs, that valium specifically was involved as a part of the conspiracy, and that others, beside him, were involved in the illegal activities. In fact, Judge Duffy explicitly advised Friedman that the charge to which he was pleading guilty involved his conspiring "with your co-defendant and possibly with others to possess with intent to distribute and/or to distribute . . . valium and amphetamines." Thus, the District Court clearly drew the distinction between individual activity and the joint activity charged in the indictment. Indeed, as Judge Duffy later observed in his opinion denying defendant's Rule 32(d) motion:

"The follow-up question pointed out the distinction between [defendant's] personal involvement with amphetamines and involvement by other members of the conspiracy." (A-152).

Friedman immediately thereafter expressed his awareness and understanding of the charge by stating that as far as he knew, only valium was involved in the conspiracy.

Thus, unlike *Irizarry v. United States*, where there was a "total dearth of anything in the record to indicate that Irizarry understood the nature of the offense," *

* In *Irizarry*, the trial judge never specifically identified the charge in the indictment, never asked defendant if he understood the charges, nor did the defendant say anything from which his understanding could be inferred. In this case, unlike *Irizarry*, each of the factors which the Court found to be disturbing was satisfied in Friedman's allocution. Thus, quite apart from defendant's presence at the allocution of Gassberg

[Footnote continued on following page]

here as in *Seiller v. United States, supra*, and *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977), the plea minutes adequately established the defendant's awareness of the charges to sustain the conviction on this collateral attack.

Moreover, both during the plea allocution and on Friedman's post-conviction motion, Judge Duffy was entitled to consider certain other factors in determining defendant's awareness of the charges. First, the District Court properly took into account Friedman's presence during Gassberg's plea, which occurred only minutes earlier and to which reference explicitly was made by Judge Duffy during Friedman's allocution. Friedman, therefore, had heard Judge Duffy earlier identify the nature of the charges and elicit Gassberg's admission of joint activity with Friedman.* Second, as Judge Duffy

which took place immediately before his own plea, Judge Duffy specifically identified the charges, asked if defendant understood the nature of the crime, and reasonably could infer Friedman's understanding from his answers and his explicit waiver of the reading of the indictment. Moreover, as this Court recognized in *Seiller*, which limited *Irizarry* to cases where the indictment itself was too complex to be susceptible of understanding by a mere reading to the particular defendant, *United States v. Saft, supra*, 558 F.2d at 1080, the nature of the charges and the background of the defendant are controlling on the extent of the inquiry which must be made.

* Friedman heard the following colloquy with his co-defendant:

Q. "Basically, the first count of the indictment charges you and others with conspiring to possess and distribute a Schedule 3 narcotic drug controlled substance and certain overt acts are thereafter alleged, the overt acts touching on Schedule 3 narcotic drugs of valium, barbiturates.

Do you understand the charges against you?

* * * * *

Q. In fact, were you involved with others in handling these Schedule 3 drugs, valium and barbiturates?

A. Was I involved with others? My co-defendant, yes."
(G.T. 2-5).

later correctly noted, Friedman was an educated, knowledgeable and experienced businessman, whose level of sophistication plainly was high enough to assure a complete understanding of the charges and the proceedings.* *United States v. Saft, supra*, 558 F.2d at 1079. Third, the District Court plainly could consider the relative simplicity and lack of confusion in the charges in the indictment. Indeed, the conspiracy charged in the indictment involved the simplest of agreements between the two men to sell narcotics over a brief period of time. There hardly was anything complicated or confusing about the straightforward conspiracy charged, and consequently no elaborate or further explanation was warranted. See *United States v. Saft, supra*, and, *Seiller v. United States, supra*, both of which involved conspiracies considerably more detailed and complicated than that charged in this case.

Finally, in accepting the plea, Judge Duffy properly relied on defendant's attorney Passin's declaration—which was not contested by Friedman at that time—that he had discussed the charges with his client.**

* Judge Duffy in his opinion observed: "Friedman, at age 29, is a knowledgeable businessman with some college training; he has served as assistant comptroller of a large well known corporation, and chief accountant for a smaller one. After leaving these positions, Friedman purchased and operated a licensed medical and dental center in Spanish Harlem and leased and operated a second clinic." (P.T. 5, A-152).

** In his 13th hour affidavit, Friedman now denies his attorney's earlier statement. (A-165-168; Br. at 14). Not only is this after-the-fact claim suspect because it contradicts Friedman's earlier silence, it is not properly before the Court. In *Seiller* this Court refused to consider the defendant's "new version of the facts," finding that the "court's inquiry in a Section 2255 proceeding properly is limited to what was before the judge at the time he was asked to accept the guilty plea." *Seiller*, 544 F.2d at 567.

In sum, on the record before Judge Duffy, the District Court properly rejected as without merit defendant's belated claim that he was not adequately advised of the nature of the charges against him. Moreover, the noticeable absence, even now, of any contention that Friedman in fact did not understand the nature of the charge to which he pleaded guilty makes manifest that defendant did understand the nature of the charges and suffered no possible prejudice from the claimed brevity of the allocution.

B. The Remaining Claimed Violations of Rule 11 Did Not Prejudice Friedman And Do Not Entitle Him To Relief.

For the first time in this Court, Friedman claims that his post-conviction Rule 32(d) motion should have been granted because Judge Duffy did not advise him at the time of his plea of his rights against self-incrimination and to appointed counsel. Since neither of these claims was raised at any time in the District Court, they should not be considered on appeal. See *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, — U.S. —, 97 S.Ct. 2686 (June 6, 1977), and cases cited therein. See also, *United States v. Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977); *United States v. Garguilo*, 554 F.2d 59, 63 (2d Cir. 1977). Friedman also argues, extending his position in the District Court, that the failure to have advised him that the two year special parole term was a mandatory minimum term, requires the vacating of his conviction. Judge Duffy, who specifically advised Friedman of a two year special parole term, although not that it was a mandatory minimum, carefully considered this additional belated claim and rejected it on the basis of the record and the absence of any prejudice

to Friedman.* The District Court's decision on this matter plainly was correct, and, under controlling case law, it is clear that none of Friedman's contentions—even those raised anew in this Court—justify relief on this collateral attack.

As a preliminary matter, Friedman frames his present argument by asserting that under *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976), and *United States v. Michaelson*, 552 F.2d 472 (2d Cir. 1977), any deviation from Rule 11 mandates vacating the guilty plea. While the flexibility for violations of Rule 11, especially in post *Journet* pleas,** is restricted on *direct* appeals, Friedman forgets that his present appeal arises out of a belated collateral attack on his conviction. Thus, the significance of the claimed violations of Rule 11 in this case must be judged under the standards set forth by this Court in *Del Vecchio v. United States*, *supra*. Accordingly, Friedman's burden on his motion was at least to

“show prejudice affecting the fairness of the proceedings or the voluntariness of the plea in order

* In the District Court, Friedman did not claim that the trial judge had failed to advise him of the minimum special parole term, but only that the two year period referred to during the allocution was incorrect. Judge Duffy correctly rejected this contention, noting that under 21 U.S.C. § 841(b)(1)(B) and § 846, the minimum special parole term for a Schedule III first offender was in fact two years. The District Court, *sua sponte*, raised and considered the failure to have explicitly advised Friedman that this term was a mandatory minimum, and rejected the claim as without merit. Friedman now has adopted Judge Duffy's own consideration of the issue as an additional ground on this appeal.

** In this case, of course, the plea and sentence antedated this Court's November 1976 decision in *Journet*. Judge Duffy's opinion inadvertently refers to *Journet* as decided four months “prior” to the taking of this plea; in fact, the decision was rendered approximately four months *after* the plea. (A. 155).

to succeed in a collateral attack based upon a Rule 11 violation. See the thorough opinion of Judge Palmieri in *Aviles v. United States*, [405 F. Supp. 1374 (S.D.N.Y.)]; cf. also *Blackledge v. Allison*, [— U.S. —, 97 S.Ct. 1621, 51 L.Ed. 2d 136 (1977)] (state habeas); *Kelleher v. Henderson*, 531 F.2d 78, 81-82 (2d Cir. 1976) (same).” *United States v. Del Vecchio*, *supra*, 556 F.2d at 111.

Friedman utterly has failed to meet that burden with respect to any of his contentions.

With respect to the advice of his right against self-incrimination, the plea minutes concededly show that Judge Duffy did not inform Friedman of this right, although the District Court did advise him of the remaining elements of Rule 11(c) (3), in fact more fully than required by the Rule.*

*Thus Judge Duffy advised Friedman as follows:

“Q. You heard me just tell your co-defendant that I could not accept the plea unless I was convinced that it was voluntary, that you understood your rights and that you understood the consequences of your plea and, in fact, you were guilty. You heard me explain to him that he would have been entitled to a public trial by a judge, a judge and a jury if he persisted in a not guilty plea.

Do you understand that?

A. Yes, sir.

Q. Do you know that at such a trial the Government would have to confront you with witnesses upon whom it relied to make out its case and you would have the right through your counsel to cross-examine those witnesses?

A. I understand that, your Honor.

Q. Do you understand that you would be presumed innocent until such time as your guilt was proven beyond a reasonable doubt?

A. Yes, your Honor.

Q. Do you know you would be entitled to call your own witnesses at such a trial and, if need be, I would issue orders for those people to show here?

A. Yes.” (P.T. 3, A-64).

However, despite this omission, as was the case in *Del Vecchio*, nowhere has Friedman stated or argued that he was unaware that he could not be compelled to testify against himself at his trial, or "that he would have acted any differently had he received the advice from the judge". *United States v. Del Vecchio*, *supra*, 556 F.2d at 111. Given Friedman's education and the fact that he was represented by counsel at all stages of the proceedings, it would have strained credulity had he made that argument. Indeed, Friedman must have known of his privilege against self-incrimination, having earlier been so advised both by an Assistant United States Attorney (GA 1a), and by the Magistrate at the time of his arrest. (A-7). Under these circumstances, even if a direct appeal had been taken, this variance from the express terms of Rule 11 would not have mandated reversal. See *United States v. Saft*, 558 F.2d 1073, 1081 (2d Cir. 1977); *United States v. Michaelson*, 552 F.2d 472, 477 (2d Cir. 1977). Certainly, in the absence of any claim that he would have acted differently had he been so informed, Friedman has failed "to show prejudice affecting the fairness of the proceedings or the voluntariness of the plea". *Del Vecchio*, *supra*, 556 F.2d 106 (1977). Accordingly, the collateral attack on the plea must be rejected.

Friedman's claim that he was not advised of his right to counsel fails for this same reason as well as for the additional one that Friedman did not have to be advised. All that Rule 11(c)(2) requires, in pertinent part, is that the defendant be informed

"if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary one will be appointed to represent him". (Emphasis added).

Thus, by the express terms of the Rule, information regarding the right to appointed counsel need be imparted

only if the defendant is not represented by counsel. See *United States v. Saft*, *supra*, 558 F.2d at 1080, fn. 7. Friedman, of course, concededly was represented by counsel.

Even if the obligation to offer advice with respect to appointment of counsel was not conditional, the failure to do so here does not establish prejudice, or affect the fairness of the proceedings, as required by *Del Vecchio*. First, Friedman clearly knew of the right to counsel. Assistant United States Attorney Batchelder earlier had informed him of this right (GA 1a), and Friedman demonstrated his understanding of it by asking to have his attorney present at the interview in the United States Attorney's office. (GA 1a). Moreover, the Magistrate specifically advised Friedman of his right to counsel "at all stages of the proceedings" (A-7), and Friedman exercised that right by having Passin with him at all proceedings up to and including his sentencing.

In a last ditch effort to suggest prejudice where none in fact existed, Friedman incredibly asserts that his guilty plea was coerced by an inability to pay Passin and his ignorance of the right to appointed counsel. The clearest refutation of this bald-faced claim is the fact that Friedman has been able to *retain* successively three different counsel through the course of these proceedings and, in addition, to pay a \$3,500 fee for this appeal. Thus, the claim that knowledge of the right to appointed counsel affected his decision to plead guilty must be viewed as an empty afterthought. In fact, Friedman had explicit knowledge of the right to appointed counsel from joint appearances with co-defendant Gassberg, who was represented by the Legal Aid Society.

Finally, we turn to Friedman's contentions concerning the advice by the District Court about the term of special parole. In advising Friedman of the maximum

possible penalty provided by law as required by Rule 11(c) (1), the following exchange took place:

Q. "You know you could go to jail for five years and pay a \$10,000 fine and two years' special parole? Do you understand that?"

A. Yes, your Honor."

(P.T. at 4, A-65).*

Friedman contends that the District Court's failure to define special parole and to specify that the two-year term was a minimum, requires the award of collateral relief. (Br. 7, 15-16).

First, even assuming *arguendo* that the reference to the special parole term was not understood by Friedman as a consequence of the plea, Friedman does not claim, nor has he ever claimed, that he would not have continued with his guilty plea had he been properly advised. Indeed, in defendant's early Rule 35 motions and letters complaining about the sentence, he never once voiced objection to the special parole term which was actually imposed.**

*Only a few minutes before, Friedman had heard explained to his co-defendant that he could receive a sentence including "two-years special parole" and had heard him asked if he understood "the kind of penalties" that could be imposed. (G.T. at 4).

** In fact, it was not until submission of the appendix on this appeal that Friedman, in an affidavit, first contended he did not know that a special parole term was required. (A-168). Even in the affidavit now improperly submitted—which should not be considered by this Court because it contains factual material not advanced in the District Court—Friedman does not allege a lack of understanding as to the meaning of the special parole term. Moreover, defendant's untimely statement that he was not aware that a term of special parole was required, is contradicted by the record of his own guilty plea, and that of Gassberg's

[Footnote continued on following page]

Second, Friedman's contention that the meaning of special parole should have been explained, is refuted by *United States v. Michel*, 507 F.2d 461, 463-64 (2d Cir. 1974). In *Michel* this Court held sufficient a colloquy in which defendant simply was asked if he understood that "special parole" must be imposed and replied affirmatively. In the present case, although Friedman was not explicitly told of the mandatory nature of the special parole term, he was advised in substance that a term of imprisonment would carry with it a term of special parole, and affirmatively stated that he understood these implications of his plea.*

In any event, given the sentence actually imposed in this case, neither the failure to have mentioned the possibility of lifetime special parole nor the specific advice of a mandatory minimum is fatal in the context of this

which he heard. It is also refuted by attorney Passin's affirmation that when Friedman "knowingly and willingly offered the plea of guilty . . . [he] completely understood the nature of the proceeding and understood the consequences of his plea . . ." (A-133). Judge Duffy's decision was grounded, in part, on the absence of a denial by Friedman:

"Friedman has submitted no affidavit denying his understanding of the special parole term or any other consequence of his plea. Considering the attorney's statement, Friedman's level of sophistication and the absence of a denial of understanding, I conclude that when Friedman was informed on the record of the possible two year special parole he understood the full meaning of that reference." (A-155).

* *United States v. Richardson*, 483 F.2d 516 (8th Cir. 1973), which was distinguished in *Michel*, 507 F.2d at 464 fn 2, is distinguishable here as well. In *Richardson*, the defendant was never asked if he understood. As Judge Duffy pointed out, *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975) is distinguishable because there "no mention whatsoever was made of a special parole term." (A-153).

collateral attack.* Here, as Judge Duffy pointed out, the "sum of the jail term imposed, three years, and the special parole term, three years, is less than the sum of the maximum jail term, five years, and the minimum special parole term, two years." (A-154). Accordingly, the present situation exactly parallels that in *Del Vecchio*, where "the sentence imposed . . . was substantially less than the total . . . he was advised was the possible maximum sentence." 556 F.2d at 111. On the basis of this fact, the Court in *Del Vecchio* held that "the judge's oversight cannot reasonably be said to have prejudiced [the defendant]." 556 F.2d at 111. See also, *Bell v. United States*, 521 F.2d 713 (4th Cir.), cert. denied, 424 U.S. 918, 96 S.Ct. 1121, 47 L.Ed. 2d 324 (1975); *Aviles v. United States*, 405 F. Supp. 1374 (S.D.N.Y. 1975), aff'd without opinion, 538 F.2d 307 (2d Cir. 1976).**

In conclusion, on this record it is a complete answer to Friedman's collateral attack that none of the claimed technical violations of Rule 11 caused him prejudice of any sort. Viewed in its entire context, the record makes plain that this well-informed and well-educated defendant pleaded guilty knowingly, voluntarily and for no other reason than that he was in fact guilty. There simply is no reason arising out of the fairness of the proceedings or otherwise, to characterize the present plea as a miscarriage of justice, and Judge Duffy's denial of Friedman's motion, therefore, should be affirmed.

* In *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976) involving a direct appeal, a guilty plea was reversed for failure, among other things, to mention the possibility of lifetime parole.

** Under the same standard, it is of no consequence that Judge Duffy incorrectly advised Friedman that the maximum fine was \$10,000. Since no fine was imposed against defendant, the error was harmless.

POINT II

Friedman Was Not Denied Effective Assistance Of Counsel By The Representation Of His First Attorney

On the motion of his third privately-retained counsel Friedman sought relief from his conviction with the unsupported assertion that he had been denied effective assistance of counsel through the representation of his first attorney, Allan Passin. After considering at length Friedman's allegations that Passin had not sufficiently investigated the facts in the case and failed to file a notice of appeal from defendant's conviction, the District Court found these contentions to be unsubstantiated by the record and insufficient to make out a valid claim of ineffective assistance of counsel. On appeal, Friedman renews the same argument, but, in addition, seeks improperly to buttress his unimpressive position with new allegations never before made in the District Court. (A-165-68).

As a preliminary matter, the Court should not reach the issue of alleged ineffectiveness of counsel. Passin was privately retained counsel who, as borne out by the record, at all times until he was replaced, enjoyed defendant's full confidence and support. As this Court held in *United States v. Bubar*, Dkt. No. 76-1140, slip op. 4519, 4536-37 (2d Cir., June 30, 1977), if a defendant

"intelligently exercised his constitutional right to be represented by counsel of his own choice, it is not necessary for [this Court] to reach the question whether [defense counsel's] representation of [defendant] conformed to this Circuit's standard for determining ineffective assistance of counsel or the related question whether such representation, even if ineffective, was so prejudicial as to deprive [defendant] of substantial rights."

Here Friedman did "knowingly and intelligently [exercise] his constitutional right to be represented by counsel of his own choice." *Id* at 4538. Passin was Friedman's "attorney and friend." (A-133). From what Friedman now says (A-166), it is clear that, like the defense counsel in *Bubar* (slip op. at 4541), Passin had represented Friedman in civil matters previously. As in *Bubar*, Friedman "knew him and had compelling reasons for entrusting his defense to him." (*Id.* at 4538-39). Nor is there doubt that in selecting Passin, Friedman had acted "knowingly and intelligently." Friedman, as noted *supra*, is an intelligent man, with decision making experience in the business world. He had "demonstrated his knowledge of the value of counsel" (*Bubar, supra* at 4541), by asking for Passin to be present at Friedman's post-arrest interview with the Assistant United States Attorney (GA 1a). Moreover, by having retained new counsel only seven days (A-19) after receiving the sentence which distressed him so, Friedman demonstrated his ability to act decisively when displeased with counsel's services, and to choose between possible counsel. Indeed, Friedman's later discharge of second counsel and retention of Mr. Finger as third counsel, after Friedman's Rule 35 motions were denied, underscored the deliberateness of defendant's actions in selecting and thereafter keeping or discharging counsel. Having made a knowing and deliberate choice of counsel, Friedman cannot now complain of his selection. *United States v. Bubar, supra*.

Even if Friedman had standing to complain, his allegations do not rise to the level required to establish ineffective assistance entitling him to a vacatur of his guilty plea. The settled law in this Circuit precludes a finding of ineffective assistance of counsel unless counsel's performance may be considered so woefully inadequate as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. *LiPuma v. Commissioner*, 560 F.2d 84, 90 (2d Cir. 1977); *United States*

v. *Bubar*, *supra* at 4536; *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976); *United States v. Taylor*, 562 F.2d 1345, 1360 (2d Cir.), *cert. denied*, — U.S. — (1977); *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).*

In the post-conviction proceedings in the District Court, Friedman contended that Passin's assistance was ineffective because he allegedly had failed to make motions, to investigate adequately possible defenses to discuss thoroughly the presentence report with Friedman, and to file a notice of appeal from the plea and sentence. This not unfamiliar potpourri of claims from a defendant obviously unhappy with the results of his case was properly rejected by the District Court.

An evaluation of a claim of ineffectiveness of counsel usually begins by examining the strength of the prosecution's case. *United States v. Bubar*, *supra*; *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36, 45 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973). Here, Friedman had met with co-defendant Gassberg on each day that Gassberg sold pills to the agents, and as Judge Duffy correctly observed, the Government's case amounted to a simple and straightforward "buy-bust" situation. Indeed, the Government's files which Passin reviewed before the guilty plea, revealed that upon his arrest Friedman admitted to DEA agents (See A-79)—as he continued to admit (A-77, 79)—that he was the source of the pills sold by Gassberg, and Friedman was found in possession of a large quantity of pills in his apartment.

* While Friedman correctly recognizes this standard (Br. 19-20), he urges its discard without presenting any new or novel reasons for departure from this well-reasoned and frequently considered principle. This Court repeatedly has emphasized its strong adherence to the stringent standard on such claims. See, e.g., *United States v. Bubar*, *supra*; *LiPuma v. Commissioner*, *supra*.

The record clearly shows that Passin fully was aware of the strength of the Government's case against Friedman and that he made a complete review of the Government's files at the invitation of the Assistant United States Attorney responsible for the prosecution. (A-130, 134). In fact, at the time of the plea allocution Passin, in Friedman's presence, was asked whether he knew of any reason why a guilty plea should not be accepted, and, with the silent approval of his client, responded that he knew of no reason. (A-66).

In the face of the ready evaporation of his claim that counsel did not adequately investigate the facts, Friedman next argues that his counsel should have moved to suppress the approximately 17,000 pills found in his apartment at the time of his arrest. However, at no time in the District Court did Friedman take issue with his counsel's sworn representation (A-134) that, according to defendant, he expressly had invited the agents in and allowed them to search his apartment.* Thus, Judge Duffy correctly determined on the record before him that "a motion to suppress, . . . would have been futile," (A-158), and the failure to have made this motion did not constitute ineffective assistance of counsel. *LiPuma v. Commissioner, supra*, 560 F.2d at 93. See also, *United States v. Rodriguez*, 556 F.2d 638, 642 (2d Cir. 1977) (counsel has "a duty not to be frivolous" and should not make meritless motions.).

Apparently recognizing the validity of Judge Duffy's holding, Friedman now belatedly has submitted to this

* In opposition to Friedman's Rule 32(d) motion, the Government obtained and submitted an affidavit from Passin. Passin averred that he had discussed the circumstances of the arrest with Friedman and that Friedman advised him he had invited the agents into his apartment and allowed them to search the premises at the time of his arrest. (A-134). This affidavit never was contradicted by Friedman in the District Court.

Court an affidavit in which for the first time he contends that the consent to search was coerced. Friedman alleges that the agents told him that they would get a search warrant if he did not consent, and that the search would be thorough. (A-166-68). In the first place, the "new facts" alleged in this affidavit are not properly before this Court and the truthfulness of the belated claim is particularly suspect since it was never advanced in *any* of Friedman's many affidavits and letters in the District Court. Cf. *Seiller v. United States*, 544 F.2d 554, 567 (2d Cir. 1975). Further, even if the facts there alleged are considered and treated as true, they would not necessarily have invalidated the consent. See *United States v. Faruolo*, 506 F.2d 490, 493-95 (2d Cir. 1974). See also *United States v. Miley*, 513 F.2d 1191, 1204-05 (2d Cir.), *cert. denied sub nom Vavarigos v. United States*, 423 U.S. 842 (1975); *United States v. Culp*, 472 F.2d 459, 461 (8th Cir.), *cert. denied*, 411 F.2d 970 (1973). It follows that the failure to have made a suppression motion, even on the grounds now asserted by Friedman, was not such a blatant or obvious omission as to amount to ineffective assistance of counsel. See *United States v. Daniels*, 558 F.2d 122 (2d Cir. 1977); *United States v. Alfano*, 555 F.2d 1128 (2d Cir. 1977). This is particularly so in light of the strength of the Government's case even without the items seized in Friedman's apartment, but to which might well have been added the testimony of Gassberg following his guilty plea.

Friedman also contends that counsel did not thoroughly discuss the presentence report with him. Even if counsel himself had not read the report, the sentence could stand, (*see, e.g., United States v. Harris*, 558 F.2d 366, 376 fn. 22 (8th Cir. 1977)), and no deficiency in the sentencing here would have affected the plea itself. Moreover, the plain facts as shown by the record are that Passin did read the report and he commented on it extensively at the time of sentencing. By Passin's very

statements, it is manifest that he must have reviewed the report with Friedman who could have been the only source of the discrepancies brought to the attention of the sentencing judge.

Finally, the failure to file a notice of appeal has no bearing on whether the guilty plea—taken two months before—was entered voluntarily. Nor is the failure to file even chargeable to Passin, inasmuch as Friedman had retained David Fox, Esq., the second counsel, within 10 days after the sentencing, and it was Fox' responsibility to pursue further relief. Fox opted to do this by way of a Rule 35 motion, rather than a post-sentencing Rule 32(d) motion to withdraw the plea. Given that a trial might have opened up the subject of how Friedman obtained the pills and that Friedman's disgruntlement was with the sentence—not the plea itself—his choice was by no means a wrong one. In a real sense, neither Passin nor Fox could have chosen to seek relief via a direct appeal, since the defendant had not preserved pre-plea issues—if indeed there were any—for appeal. (A-131). As Judge Duffy observed, "[c]onsidering the joint decision by counsel and defendant to offer a guilty plea, I cannot fathom why trial counsel could have sought to appeal." (A-159).

POINT III

Neither Resentencing Nor An Evidentiary Hearing Was Required On Friedman's Collateral Attack.

As a final matter, Friedman contends that his post-conviction motion entitled him to a sentencing hearing or to resentencing on the basis of disputed information in the pre-sentence report. Specifically, Friedman asserts that inclusion in the "Government's Version" portion of the pre-sentence report of the informant's statement that

Friedman was responsible for distributing approximately 10,000 to 20,000 barbiturates on a weekly basis, was improper. Although Friedman does not deny that he was allowed to rebut this allegation at the time of his sentence and in fact did so, he now urges that once the informant's statement was presented to Judge Duffy, an evidentiary hearing was required even though defendant never requested one. (Tr. at 28-30).*

First, as Friedman must concede, he was afforded an opportunity to rebut the informant's statement at sentencing and, in fact, a full statement of his own positions was before Judge Duffy at the time of sentencing. (Br. at 29). During the pre-sentence investigation Probation Officer Mendel questioned Friedman regarding the allegation of broader narcotics activity and included Friedman's own version of the offense in the pre-sentence report. The Probation Department accurately reported in the pre-sentence report Friedman's assertion that the narcotics transactions involved in this case amounted to a "one-shot affair" a position which defendant himself reiterated in his allocution at sentencing. (S.T. 5, A-72). It is thus apparent that Friedman, upon due notice of the other information submitted by the Government, received an adequate opportunity to rebut the allegations made against him, and took advantage of that opportunity with a simple, verbal denial of the claim. Nothing further was required. *United States v. Rosner*, 485 F.2d 1213, 1230 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). See *Townsend v. Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252,

* Friedman also seems to argue that because of allegedly improper sentencing procedures the guilty plea should be set aside. However, even if the sentence was somehow improper—and we vigorously contend it was not (see *infra*)—Friedman's sole remedy would be a remand for a new sentencing. Defendant's contentions in no way affect the guilty plea itself. See *United States v. Needles*, 472 F.2d 652, 654-56 (2d Cir. 1973).

1255, 92 L. Ed. 1960 (1948); *United States v. Malcolm*, 432 F.2d 809, 816-17 (2d Cir. 1970).

This Court has made clear that the procedure to be followed in enabling a defendant to present his version of the facts at sentencing is within the sound discretion of the sentencing judge. *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976). See *United States v. Needles*, 472 F.2d 652, 658 (2d Cir. 1973). While Friedman now argues that an evidentiary hearing should have been held to evaluate the Government's allegation of continued activity and his denial thereof, no such hearing was required where defendant otherwise has had a full opportunity to rebut the allegations. *United States v. Robin*, *supra*, 545 F.2d at 779, and cases therein cited; *United States v. Rosner*, *supra*, 485 F.2d at 1230-31. Indeed, this Court has held that "normally, verbal explanation or comment is sufficient." 485 F.2d at 1230. Moreover, it bears emphasis that at the sentencing here neither Friedman nor his attorney requested such a hearing to resolve the discrepancy, a decision likely dictated by tactical considerations that a full blown evidentiary hearing well might have worked to Friedman's detriment rather than to his gain.*

* The difference between the informant's claim that Friedman was responsible for a series of weekly pill distributions and defendant's version that the entire matter was "one-shot" largely might have been one of semantics. Friedman, after all, had been found in possession of an enormous quantity of illegal pills and had participated in two attempted distributions of smaller quantities within a two-week period. Thus, counsel well might have been of the sound view that it was better to gloss over the allegation of a more sustained criminal enterprise, with defendant's simple claim that the entire episode was "one shot," rather than risk an emphasis on the broader activities which would have resulted from an evidentiary hearing and its broad-brushed disclosures.

Second, while Friedman's apparent challenge to the length of the sentence itself cannot properly be considered by this Court,* on the facts conceded by Friedman the sentence was warranted. Friedman's offense was not minor, particularly for an educated and knowledgeable defendant who had no acceptable excuse for his conduct. By his own admission Friedman was caught with more than 17,000 pills, approximately 10,088 of them containing barbiturates. Judge Duffy would have been justified in finding incredible Friedman's contention that his purchase of the pills was a "one-shot" affair. Other factors also undermined Friedman's version. Friedman admitted to the probation officer that he had supplied pills to Gassberg who in turn had resold them to agents on *two* occasions. Friedman did not contest (A-167) that during the undercover negotiations, Gassberg—who was supplied with his wares by Friedman—offered to make similar transactions in the future on a *weekly* basis. Nor was Gassberg the only customer of Friedman's. Friedman himself acknowledged that, before meeting Gassberg, Friedman had sold approximately 2,300 pills for \$2,500. Indeed, Friedman himself volunteered that it was only because his friends were comparatively disinterested in the kind of pills which he had that he had not sold more to them. (Defendant's Version—PSR at 2.) Thus, as in *Needles, supra*, Friedman's own admissions undercut his version of events and tended to corroborate the informant's statement.

* "Once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 424, 431, 97 S.Ct. 3042, 41 L. Ed. 2985 (1974). See *United States v. Riniolo*, 554 F.2d 550, 551 (2d Cir. 1977); *United States v. Scifo*, 537 F.2d 694, 700 (2d Cir. 1976). Here the three year jail term actually imposed was substantially less than the five year maximum allowed.

Finally, Friedman's present claims particularly are without merit since he has had repeated adequate opportunities in his Rule 35 motions to again state his version of events, and to supply information concerning allegedly mitigating factors to the sentencing judge. This information all was considered by Judge Duffy and found by the District Court not to warrant any reduction in sentence. In such circumstances,* the sentence imposed here cannot be considered excessive, and does not provide any occasion for relief on this collateral attack.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

RHEA KEMBLE NEUGARTEN,
 HARRY C. BATCHELDER, JR.,
 ROBERT J. JOSSEN,
*Assistant United States Attorneys,
 Of Counsel.*

* Without dwelling on the additional circumstances which warranted the present sentence, we note briefly that Friedman admitted abusing the medicaid facilities operated by him in Spanish Harlem. Friedman failed to turn over to the Government the federal withholding taxes taken out of the paychecks of his employees. Instead, he converted these funds to his own use, allegedly to keep the business going. (PSR at 11, A-69.)

APPENDIX TO THE GOVERNMENT'S BRIEF

**Statement of Defendant before Arraignment made
to Assistant United States Attorney**

Name of Defendant Gilbert Friedman

Date: Dec. 16, 1975

Time Interview Commenced: 11:15 a.m.

Q. My name is Harry C. Batchelder, Jr., I am an Assistant United States Attorney. You have been arrested for a violation of 21 U.S.C. § 846—which relates to conspiracy to distribute drugs—In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. —Yes—

Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. —Yes—

Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. —Yes—

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A. —Yes—

—Requests—Mr. Passin—

Q. If you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

Can ask background questions

Q. Would you like to answer some questions about your background? You may pick and choose those questions you wish to answer, and you may stop at any time.

Can ask background questions

NAME:—Gilbert Andrew Friedman

DOB:—4/4/47 MARITAL STATUS:—Married
(Separated)

SOCIAL SECURITY NUMBER:

SPOUSE:—Andrea—DOB:

CHILDREN:—None—

ADDRESS:—301 East 49th St. APT. 5E RENT: \$425.00

BEGAN LIVING THERE:—Jan. 74—

HOME TELEPHONE:—371-3712

DATES:—1972—

PREVIOUS ADDRESS:—320 East 52nd St.

EMPLOYED:—Self-employed—Accountant

HOW LONG:—10 years—

BUS. PHONE:—369-6101—

WAGES:

PREVIOUS EMPLOYMENT:

WAGES:

PARENTS:—Margaret & Eugene Friedman

ADDRESS:—Miami

WHO RESIDES WITH YOU?—Nobody—

WELFARE

FOOD STAMPS?—X—SELF:—X—SPOUSE—X
PROGRAM:

UNEMPLOYMENT?—X—LOCATION:—X

ARRESTS:

PLACE—No—

CHARGE—No—

DISPOSITION—No—

DISPOSITION—No—

SENTENCE—No—

TIME SERVED—No—

PROBATION—No—

EDUCATION:—No—

YEARS:—No—

WHERE:—No—

CURRENT MEDICAL PROBLEMS:

PHYSICAL:—No—

MENTAL:—No—

HAVE YOU TAKEN OR ARE YOU NOW TAKING
DRUGS?

ADDICT?—No—

EVER ADDICTED?—No—

WHAT DRUG?—No—

DRUG PROGRAM?—No—

ALCOHOL?—No—

HEROIN (X) COCAINE (—Yes—)

MARIJUANA OR HASHISH—(Yes)—

AMPHETAMINES (—No)—

METHADONE (—No—)

LSD (Yes) OTHER:

DO YOU (OR YOUR SPOUSE) HAVE ANY BANK
ACCOUNT?

WHERE:—No—

FINANCIAL:

CASH ON PERSON—\$2.00—

SAVINGS—None—

STOCKS OR BONDS—None—

CAR—No—

HOUSE—No—

OTHER PROPERTY—Business

DOES YOUR SPOUSE WORK? WHERE?

CITIZEN OF:—U.S.A.—ENTRY TO U.S. DATE: N/A

PORT OF ENTRY:

PLACE OF BIRTH:—Belgium—

ALIEN REGISTRATION NUMBER:

REGISTERED WITH SELECTIVE SERVICE?

HAVE YOU EVER SERVED IN THE ARMED
FORCES?—No—

WHEN?

TYPE OF DISCHARGE?

DO YOU HAVE ANY RELATIVES IN N. Y. AREA,
OTHER THAN THOSE MENTIONED ABOVE?

NAME:—Lea Weintraub—

ADDRESS:—22-15 Avenue Y—
Brooklyn, N. Y.—

WHEN WERE YOU ARRESTED?—3 or 4 Dec. 15th

WHERE?—301 East 48th St.

DO YOU HAVE ANY COMPLAINTS ABOUT THE
WAY THE AGENTS TREATED YOU?

—No complaints—

WOULD YOU LIKE TO TELL ME WHAT
HAPPENED—No statement

TIME INTERVIEW TERMINATED:—11:25 a.m.

WITNESSED: ASSISTANT U. S. ATTORNEY
HARRY C. BATCHELDER, JR.

AGENTS: (Illegible)

(Illegible)

5a

BAIL RECOMMENDED:—25,000— P.R.B.
POSSIBLE BAIL SUGGESTED
BY DEFENDANT:

BAIL SET BY MAGISTRATE:—5,000—P.R.B.
TIME OF
ARRAIGNMENT:—a.m.—12:05 p.m.

HEARING:—January 5, 1976
LAWYER
.....
.....

BAIL WARNINGS GIVEN?
TELEPHONE
APPOINTED OR RETAINED
(CIRCLE ONE)

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Rhea Kemble Neugarten being duly sworn,
deposes and says that She is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *16th* day of *January*, 1978,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Stephen David Fink
: 125-20 Queens Boulevard
Kew Gardens, N. Y.
11415

and deponent further says that She sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

16th day of *January*, 1978

Maria A. Israelian
MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978